

No. 12874

12874

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES LINES COMPANY, a corporation,

Appellant,

vs.

WILLIAM J. CUMMINGS,

Appellee.

APPELLANT'S REPLY BRIEF.

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No. 12824

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UNITED STATES LINES COMPANY, a corporation,

Appellant,

vs.

WILLIAM J. CUMMINGS,

Appellee.

APPELLANT'S REPLY BRIEF.

The testimony describing the accident is the heart of this dispute and this appeal. (Appellant's Op. Br. pp. 8-14.) Notwithstanding, appellee has not attempted a head-on rebuttal of appellant's appraisal of that testimony. (Appellant's Op. Br. pp. 14-17.) Nor does appellee cite a single page of the record in support of his contention that "substantial," "specific" and "positive" testimony proved that the ladder slipped and dropped two feet. (Appellee's Br. pp. 2, 6, 14, 16, 19, 23.)

Appellee has attacked what he calls appellant's "hypothesis" by setting forth portions of appellee's witnesses' testimony. (Appellee's Br. pp. 2-3.) None of that testimony is reliable. Otherwise, appellee has confined himself to an oblique attack. He has accused appellant of a misleading presentation of the evidence. He has scoured the record to find inconsistencies in the testimony of appel-

lant's witnesses on collateral matters. And in an endeavor to support his case he has been forced to resort to implications and speculation.

By assuming the point in issue—whether or not the ladder slipped—appellee has attempted to make this a *res ipsa loquitur* case. (Appellee's Br. pp. 17-22.) Clearly, it is not.

Appellee has strained to overcome appellant's testimony. He has done this at random throughout his brief. Because appellee has not discussed each point individually, it has been impossible to reply sequentially. Insofar as possible appellant has attempted to arrange its brief to follow the order of appellee's argument.

I.

Appellee Has Failed to Show That the Evidence or Probabilities Support the Decision of the Trial Court.

A. There Is No Competent Evidence to Contradict Appellant's Witnesses Who State That Appellee Stepped on the Ladder While the Pilot Boat Was in a Trough of the Sea.

Appellee has quoted limited passages from the testimony of appellee's witnesses in an attempt to rebut what he refers to as appellant's "theory," "hypothesis," or "explanation of the accident." (Appellee's Br. pp. 2-3.) Appellant has no "theory" or "hypothesis," but relies on and has set forth what appellant contends is the only competent testimony describing the accident. [R. 189, 218, 232, 261.] Appellee has charged appellant of a misleading presentation of the evidence. However, it is to be noted that appellee has failed to quote a single additional word or phrase which actually describes the accident.

Before analyzing appellee's witnesses' testimony set forth on pages 2 and 3 of appellee's brief, we quote O'Brien's testimony on cross-examination [R. 146-147]:

“Q. Were you standing erect or were you sort of crouching down? A. I was usually holding the weight of Captain Cummings, or ready to hold his weight. I was looking directly at the side of the ship.

Q. But what was your stance? Were you crouched or standing erect? A. Oh, I was crouched.

Q. To steady yourself? A. That's right, sir.

Q. How, then, could you tell whether the pilot boat was at the top or the bottom of the swell? A. Well, the pilot would never go on if it wasn't.

Q. I see. Then you don't know, yourself, you just assume he would not step up except on the top of the swell? A. I surely would have noticed if he didn't, sir.

Q. How would you notice? A. Well, it is the usual procedure to go aboard from the top of the swell.

Q. And that is what you base your conclusion on that it was at the top of the swell? A. Yes, sir.

Q. And from nothing that you observed yourself? A. No, sir.”

The striking thing about both Hall's and O'Brien's testimony is that neither of them actually says Cummings stepped off the pilot boat at the crest of the swell. On close examination it is apparent that they were testifying as to usual procedure and not with reference to the particular occasion when Cummings was injured. O'Brien admits this. [R. 146-147.]

Hall states that it is his job to watch when “they” step and only implies that Cummings stepped off on the crest of the swell. [R. 118.] But Hall was obviously not in a position to judge. He was located inside the pilot house and was preoccupied with holding the pilot boat alongside the Princeton Victory. To do this he had to turn half way around to operate the engine room controls, which were located aft of the wheel. [R. 126-127.] Hall could not even see the surface of the water when the pilot boat was alongside the Princeton Victory. [R. 128-129.] Further, he says that O’Brien was between him and Cummings. [R. 127.] This statement is contradicted by O’Brien who testified that at no time did he get between Cummings and Hall. [R. 145.] This error seriously discredits the accuracy of any of Hall’s observations of conditions or events occurring at that time.

Cummings does say he stepped over to the ladder when the pilot boat was at the top of the swell. [R. 54.] He probably thought he stepped when the pilot boat reached the crest, otherwise he would not have stepped. But how can Cummings know? After he stepped he had no way of knowing whether the pilot boat continued to rise or started falling off. He had lost all physical contact and his eyes were squarely fixed where he placed his hands. [R. 105, 106.] He did not wait, as common prudence would dictate, for two or three swells to pass so he could get the feel of the rise and fall of the pilot boat. [R. 52, 104, 105.] Under the circumstances, it is no wonder that he misjudged and stepped too soon.

On page 4 of his brief appellee by means of a warped paraphrase of Hall’s testimony attempts to demonstrate that appellee stepped off at the crest of the swell rather than in the trough. Appellee says in his brief, “As soon

as Captain Cummings dropped, Hall stepped over to him.” What Hall actually said was [R. 118]:

“Q. What, if anything, did you do when you became aware that something was wrong? A. When he dropped, with his legs out of sight, I called the deckhand to take the wheel, and went forward, and his legs were down on the rub rail, and at that time the boat dropped and I got ahold of his hips, to help him, and he told me to back the boat away, and I relayed the order to the deckhand.

Q. You say you got ahold of Captain Cummings’ hips? A. Yes, sir.

Q. Where were his hips with reference to the top of the rail of the Stephen M. White when you did that? A. Well, they was just about, I would say, level with my chest.

Q. With you in what position? A. Standing on the deck of the pilot boat.

Q. With you standing on the deck of the pilot boat, Cummings’ hips would be about chest high on you? A. Yes, with him on the ladder.”

It is clear that Cummings had not changed his position on the ladder. To reach that position he had stepped up twenty-two inches from the deck of the pilot boat to the rail [R. 104, 105], and presumably at least a foot on up to the ladder. This would put Cummings approximately three feet higher than his original position standing on the deck. Hall was standing on the deck when he says Cummings’ hips were level with his chest. Hall states that the pilot boat was at that moment in the trough. Since Cummings would have been in exactly that position had he stepped off while the pilot boat was in a trough, we submit that this circumstance corroborates rather than negatives appellant’s contention.

Appellee would have us believe that the pilot boat obligingly remained poised on the crest of the swell while the following activity took place: Cummings stepped from the rail to the ladder and then fell approximately two feet; thereafter, Hall, realizing the predicament, called the deckhand, made his way from his position inside the pilot house to the deck, then made his way forward to Cummings. *At that time the boat dropped.* This, we submit, is utterly fantastic. Hall could not possibly have done all he did in the brief instant the pilot boat remained on the crest of the swell. During the interval described the pilot boat must have gone from trough to trough. There could be no more convincing proof that Cummings stepped from the pilot boat before she reached the crest of the swell.

B. Probabilities Do Not Establish That Appellant Would Not Step Off the Pilot Boat in the Trough of the Sea.

Appellee would have the court believe that transferring from a small boat to a ship in the open sea is a simple maneuver. (Appellee's Br. p. 4.) On the contrary, Cummings himself testified, transferring is dangerous. [R. 54.] Appellee's analogy to an experienced trainman stepping from a moving train with his back to the locomotive is not a fair comparison. (Appellee's Br. p. 4.) Appellee's example is more analogous to appellee walking off the wrong side of the pilot boat. Obviously, neither event is likely to occur. But experienced trainmen do get injured stepping from moving trains and many experienced seamen have been injured transferring to Jacob's ladders from small boats.

Actually, the state of the sea must not be camouflaged by the use of the word "calm." (Appellee's Br. p. 4.)

Calm is a relative term. Appellee's own witnesses, who were in the best position to judge, state that the swells were two to four and one-half feet high. [R. 87, 115, 122, 139, 147.] Those estimates referred to swells away from the side of the ship. The swell immediately alongside the ship would be even higher. Waves or swells always increase in amplitude when they come up against a solid structure such as a large ship dead in the water or a cliff or breakwater. The water must pile up to an increased height because the obstruction will not move and cannot transmit the wave motion. Hence the potential energy of the wave is released through increased amplitude.

Boarding at sea by a Jacob's ladder is not a simple maneuver. Careful observation, judgment and timing are required. It cannot be performed mechanically or without thinking; not even by an experienced man such as appellee. Any argument favoring appellee's contentions based on probabilities is not effective against the convincing evidence on the record. On the contrary, it is most improbable that Captain Baylis, Chief Officer Kjeldsen, Gallaher and Garcia, all of whom were experienced seamen, and obviously conscious of their duties with respect to the proper rigging of the ladder, would each be so derelict in that duty as to permit it to be slack. As discussed on pages 20 and 21 of appellant's brief, the testimony strongly shows that appellee was negligent and did not take time to evaluate the situation. No attempt has been made in appellee's brief to deny, explain or justify his carelessness.

C. Appellee Has Not Overcome the Direct Testimony Either by Inferences or by Discrediting Appellant's Witnesses.

Throughout appellee's brief the observation is made that "substantial," "specific," and "positive" testimony proved that the ladder slipped and fell two feet. (Appellee's Br. pp. 2, 6, 14, 16, 19, 23.) Appellee's brief has not pointed it out by a single citation to the record. The nearest approach is on page 14 of the brief, when appellee repeats his testimony that, "the rungs played out over the rail." Obviously, in the light of the cross-examination, that statement was a mere conclusion. (Appellant's Op. Br. p. 15.) No motion to strike was made because it did not become apparent until cross-examination that Cummings did not look higher than where his hands grasped the ladder. [R. 105-106.] Even assuming that there were two feet of slack inboard of the rail, and that is most improbable, it is not likely in view of the construction of the ladder that many rungs are going "to play out over the rail." At least not enough that one well below the rail and not looking up would notice it.

Nor does the discussion at page 13 of appellee's brief bolster his conclusion that the ladder slipped. Obviously, the witnesses' observations of the relation of the bottom end of the ladder to the water line were general ones and did not have reference to the moment Cummings stepped on the ladder. In this connection it must be borne in mind that the "water line" varied from second to second by reason of the wave movements and estimates are therefore meaningless unless made in reference to the same stage of the swell. Great stress is placed upon the statement of Captain Baylis that at the time of the accident the bottom of the ladder was approximately two feet from the sea. If appellee insists in placing unwarranted sig-

nificance upon this fact, we say it confirms that there was a trough, not a swell, at the ship's side at the particular moment.

On page 15 of appellee's brief there is an attempt to add credence to his witnesses by the implication that Cummings was referring to slack in the ladder when he said "you had better fix the pilot ladder." That does not give Cummings credit for any seamanlike qualities. It must have been apparent after he had remained on the ladder and climbed it that there was no slack. Cummings obviously was referring to the smashed part of the ladder which would require fixing. Appellee claims that Mr. Kjeldsen admitted this statement but has failed to fully quote his testimony on the point. It is most revealing and speaks for itself. On page 263 of the record Mr. Kjeldsen said:

"A. When we heaved Captain Cummings on the deck we carried him towards the hospital which was a short distance away, and he made a few remarks to the captain of the pilot boat for not pulling away before he was injured and also, when we carried him into the room, he told me to fix the pilot ladder, which I didn't understand until I went out again and pulled it on the deck and found that when he was hit, also two rungs were broken."

Appellee did not deny this statement.

Appellee has attempted to impugn the credibility of appellant's witnesses by pointing out every possible inconsistency in their testimony. (Appellee's Br. pp. 6-12.) These inconsistencies in the main relate to incidental and

collateral matters which in no way affect a determination of the major issues. Inconsistencies of this sort are present in every case. Appellant's witnesses scattered shortly after the accident and long before this suit was filed and did not have the opportunity of "comparing notes." Furthermore, their testimony was taken at widely separated times in advance of trial by deposition. There was no opportunity, as would have been the case had they been present at the trial, to clear up or reconcile possible inconsistencies, if that were necessary. It would be strange, indeed, if under such circumstances these witnesses were not to some extent, inconsistent on minor matters.

Appellee's witnesses, who were in almost constant contact with one another subsequent to the accident and prior to the trial, were also inconsistent on collateral matters. For example, appellee testified that the ladder was rigged at a point 75 to 100 feet forward of the PRINCETON VICTORY's bridge [R. 92-93]; Hall testified that it was within 15 feet forward of the bridge [R. 129], and this is confirmed by all of the other witnesses who testified on this point. [R. 243, 260.] Hall testified that when Cummings stepped upon the ladder his view was blocked by the deckhand who was assisting him [R. 127]; O'Brien, the deckhand, testified that he was standing forward of Captain Cummings, and that he did not at any time get between Cummings and the pilot house. [R. 145.] There are other inconsistencies, but we do not feel that discussion of them is at all helpful to the determination of the important issues. Also, we think it would unnecessarily complicate the discussion to engage in a protracted argument over each of appellee's claimed inconsistencies and we limit our discussion in this connection to a few points.

There is a definite conflict in the testimony with reference to whether the ladder was damaged and raised prior to Cummings' attempt to board the Princeton Victory. But contrary to the implication in appellee's brief, at pages 6 to 7, there is no inconsistency in appellant's witnesses' testimony on this point. The conflict is solely between appellant's and appellee's witnesses. This was pointed out at pages 3 to 4 of appellant's opening brief with full citation of the record. We cannot follow appellee's claim that a denial of these occurrences discredit appellant's witnesses. The physical facts and inferences to be drawn from the testimony on this vital issue are by no means necessarily consistent with appellee's version. If it follows that one set or the other of the witnesses was "fabricating" on this point, we submit that it is much less likely that appellant's witnesses would have had the opportunity to do so than would those testifying for appellee.

We grant that some of Garcia's statements may not be entirely accurate. We think that this is attributable to his obviously excitable Latin temperament. His testimony has a definite ring of sincerity and of all the witnesses produced by either side, he is the least likely to have been influenced in favor of the party producing him. Certainly appellant had no claim upon his loyalty since he was no longer employed by it. The attempt to discredit Garcia by inferring that he did not go down the ladder to assist appellee after the accident is unwarranted. (Appellee's Br. p. 10.) All the witnesses with-

out exception, who testified on the subject, including Cummings, said that Garcia (or a colored man) either reached or went down the ladder some distance to assist Cummings. [R. 216, 237, 262, 282.] In all probability had it not been for Garcia's prompt action, Cummings would have received far more serious injuries.

The attempt on page 11 of appellee's brief to discredit Gallaher by the argument based upon his statement that Cummings "boarded the ship down on the bottom rung of the ladder * * *" is an example of hair-splitting. It completely disregards the testimony that at that time the pilot boat was in a trough which could have put the boat below the ladder. Furthermore, if, as Cummings claims, these two rungs had been damaged by the pilot boat prior to that time, it must logically follow that the boat could have struck that point of the ladder again.

On page 12 of his brief, appellee claims that none of appellant's witnesses could remember *how* the ladder was secured. This is not true. The witnesses knew how it was secured, but expressed some doubt as to *what* the ladder was secured. As pointed out on pages 17 and 18 of the opening brief, Garcia testified positively as to how the ladder was secured. It is understandable that after a long lapse the witnesses could not remember precisely to what object the lashing was secured.

A careful review of the record indicates that of all of the witnesses called by either side, the testimony of Mr. Kjeldsen, the Chief Officer, contains the least number of

contradictions with others. His testimony does not necessarily conflict with that of appellee's witnesses except on the question of whether Cummings stepped off in the trough or at the crest of a swell. During the approach of the pilot boat to the Princeton Victory Mr. Kjeldsen was making his way from his quarters two decks above the main deck to the head of the Jacob's ladder and he probably did not see what transpired close aboard the Princeton Victory during the first approach of the pilot boat. The following testimony by Mr. Kjeldsen is particularly significant [R. 261]:

“Q. Will you describe what happened after this inspection you are speaking of? Will you describe what happened next? What was the next event?
A. After I checked the lines for being made fast securely, I looked over the side again and the pilot boat was alongside and Captain Cummings was about to step up on to the ladder. He stepped on when the pilot boat was in the trough and right after that the swell caused the pilot boat to rise and roll against the side of the ship, and the captain was between the ship and the pilot boat.”

The lapse of the time between the completion of the inspection and the accident must have been most brief. This testimony clearly negatives appellee's inference that the inspection of the ladder on board the Princeton Victory took place prior to the alleged raising and lowering of the ladder and indicates beyond question that the ladder was taut at the time of the accident.

II.

Appellee's Injuries Could Not Possibly Have Resulted From Dropping Two Feet and Wedging His Foot in the Ladder.

On pages 4 to 6 of his brief appellee has committed himself to a theory of the accident that is impossible. As we understand it, appellee contends that his injuries were the result of wedging the toes of his foot between the two parallel rungs forming a step of the ladder after a two foot drop. Doctor Langan, who attended appellee described the injuries at length. [R. 70-74.] All of the toes showed compound fractures. There was a traumatic amputation of the toes and the bone "was just hanging." The skin was evulsed or torn from its attachment in two directions—backward toward the upper leg and down toward the toes. The ankle was swollen and painful. Appellee was in shock and suffering severe pain from the loss of tissue. He was given a hypodermic injection for the relief of his pain. His shoe was torn and damaged. [R. 264.] Surely, such severe injuries could not have resulted from a mere two-foot drop, particularly when part of appellee's weight was supported by his hands which at all times retained their grip upon the ladder. The severity of the injuries is consistent only with the application of a great force—obviously that of the pilot boat coming against the side of the ship.

In arguing on pages 4 to 6 of his brief, appellee has manifested a glaring lack of knowledge of wave motion and the manner in which a boat rides in a swell. For an illuminating but not too technical discussion there is an excellent chapter on waves in *The Oceans*, pages 516-545, by H. V. Svedrup (1946). *Know Your Own Ship:*

A Simple Explanation, pages 244-245, by Thomas Walton (12 Ed. 1921), contains a brief description of how a vessel rides in a sea. The discussion below is based on information contained in these two books.

Appellee argues on page 5 that even if he had stepped off in the trough his foot would have been pushed up and clear by a vertically rising boat. But a boat riding in a long rolling ground swell does not rise and fall absolutely vertically. It tends to surge with the swell. On the front side of the swell, horizontal motion is imparted to the boat in the direction of the swell. The impetus to this motion is the same energy which propels surboard riders. On the back side of a swell the boat falls off and away from the direction of the swell. When a small boat is alongside a ship and not underway this motion can become very pronounced. On this occasion the pilot boat was on the swell side of the *Princeton Victory*, hence she would tend to move toward the side of the ship as she rose on the swell.

On the front side of the swell the pilot boat would have rolled in toward the *Princeton Victory's* side exactly as appellant's witnesses described. [R. 215, 232, 261.] The pilot boat would not push the ladder upward as appellee claims, but would pin the ladder and anything else it caught against the side of the ship.

The only plausible way that appellee could have received his injuries was by the pilot boat pinning his toes against the side of the *Princeton Victory* in the precise manner described by appellant's witnesses. [R. 215, 232, 261.] At the same time that Cummings was injured the pilot ladder was smashed. [R. 186, 218, 234, 263.]

III.

The Doctrine of *Res Ipsa Loquitur* Is Not Applicable in This Case.

In arguing that *res ipsa loquitur* applies, appellee assumes that the ladder dropped two feet. (Appellee's Br. p. 17.) But that is the crucial fact in this case and appellee's assumption that the ladder did slip is unwarranted. However, regardless of what facts appellee assumes, this case cannot meet the cardinal requirement of a *res ipsa* situation.

Dean Prosser has recently said in his excellent article on "*Res Ipsa Loquitur* in California," 37 Cal. L. Rev. 183 (1949) at 191:

"A *res ipsa loquitur* case is a circumstantial evidence case which permits the jury to infer negligence from the mere occurrence of the accident itself. Its first requirement is a basis of past experience which will permit the triers of fact to conclude that such events do not ordinarily happen unless someone has been negligent."

The cases cited by appellee on pages 17 to 21 of his brief all recognize this requirement.

Experience has shown that the most likely source of accidents during boarding operations at sea is the sea itself. This is recognized by appellee himself. [R. 54.] Negligence of the boarder is almost invariably the co-existing factor producing the accident. Certainly an accident of the sort involved in this action fails to meet the first basic requirement of a *res ipsa* case. A discussion of the other requirements would be superfluous.

If the trial court were justified in finding that the ladder slipped it would create a strong inference of neg-

ligent rigging. We feel most strongly, however, that appellant has affirmatively shown due care and that there is no place whatever for the operation of any inference.

For a court to find that appellant was negligent it must necessarily accept appellee's theory that the ladder was raised and thereafter partially lowered, thereby permitting some slack to remain in the ladder. If this conclusion is reached it most certainly follows that appellee himself was guilty of negligence proximately contributing to his injuries. He maintains that he saw the ladder raised and then lowered. [R. 45, 48.] But he did not thereafter take any action designed to ascertain whether the ladder had been lowered all the way and was secure as ordinary prudence would dictate. He remained in the pilot house until the pilot boat was in position alongside the ladder. [R. 52, 96.] He then walked directly forward and waited just long enough for the pilot boat to raise on a single swell before he stepped on the ladder. [R. 52, 104.] He did not look the ladder over. [R. 50, 105, 106.] Although he claims to have heard O'Brien ask those on deck of the Princeton Victory whether the ladder was fast [R. 51], he made no effort whatever to ascertain whether that alleged inquiry had been answered. Assuming appellee's version of these events to be true, had he taken these normal precautions, the alleged unsafe condition of the ladder would have been ascertained and the accident avoided. Therefore, any recovery appellee might otherwise be entitled to should be defeated or diminished accordingly.

Conclusion.

Nothing which has been said in appellee's brief has in any way contradicted the direct competent evidence indicating: (1) that the ladder did not slip, (2) that appellee stepped off the pilot boat before she reached the crest of the swell, and (3) that the pilot boat rose up on the swell and rolled in on appellee's foot.

Appellee has not produced any direct competent evidence to the contrary. He has talked around the heart of the case and has resorted to elaborate speculation and an attempt to discredit the direct competent testimony of the deposition witnesses.

Rule 52(a) authorizes this court to weigh the evidence and to set aside the trial court's findings if it is convinced that a mistake has been made. We are certain that an objective appraisal of the evidence will leave this court with a definite and firm conviction that a mistake has been made by the trial court.

The judgment appealed from should be reversed and the complaint dismissed with costs in all courts to appellant.

Respectfully submitted,

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